



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 15, 1991

Mr. David L. Yett
Assistant City Attorney
The City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76102

OR91-502

Dear Mr. Yett:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 13274.

The manager of the DFW Railtran System has received a request for information relating to a proposed venture between the cities of Dallas and Fort Worth. Specifically, the request includes correspondence and memoranda; Department of Transportation Office of Inspector General audit reports and responses thereto; billing statements; expense reports; grant applications filed with the Urban Mass Transportation Administration (UMTA); and financial audits prepared by or for the cities of Dallas and Fort Worth. You do not object to disclosing some of the requested information; however, you claim that the remaining information is excepted from required public disclosure by sections 3(a)(1), 3(a)(4), 3(a)(5), 3(a)(7), and 3(a)(11) of the Open Records Act.

Previous open records decisions issued by this office resolve your request. Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that a draft report titled "Audit of Acquired Railroad Properties" is made confidential by federal law. Section 7.71(a)(1) of title 49 of the Code of Federal Regulations makes confidential

Opinions, advice, deliberations, or recommendations made in the course of developing official action by the Government, but not actually made a part of that official action.

Section 7.71(a)(4), in pertinent part, makes confidential

information generated by the Government where disclosure of such information would prejudice the Government's bargaining position in commercial transactions. Examples of records covered by this section include staff memoranda containing advice, opinions, recommendations, suggestions, or exchanges of views, preliminary to final agency decision or action, with the exception of factual information, unless such information is inextricably intertwined with deliberative material; draft documents such as draft versions of audit reports prepared by the Office of Inspector General

In a letter to this office dated September 9, 1991, Paul Jensen, Regional Counsel to the UMTA, advises us that the "Audit of Acquired Railroad Properties. . . is the subject of an audit conducted by the U.S. Department of Transportation's Office of Inspector General." The draft report may be withheld from required public disclosure under section 3(a)(1) of the Open Records Act in conjunction with section 7.71(a)(1) and (a)(4) of title 49, of the Code of Federal Regulations.

You also contend that the series of letters submitted as Exhibits C and D contain information which, if disclosed, might harm the governmental body's negotiating position with owners of property under consideration for the Railtran site and is thus excepted from disclosure by section 3(a)(5). Section 3(a)(5) excepts

information pertaining to the location of real or personal property for public purposes prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor.

Section 3(a)(5) is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision No. 564 (1990). Whether a particular appraisal report falls under section 3(a)(5) is a question of fact, and the attorney general will accept a governmental body's good faith determination that release of an appraisal report would damage its future negotiating position, unless the contrary is shown as a matter of law. *Id.* Information within the scope of section 3(a)(5) which pertains to negotiations for the acquisition of real or personal property may be withheld so long as the transaction is not complete. Open Records Decision No. 310 (1982).

You advise us that "[t]he location and acquisition of property for the proposed [maintenance facility] site has not been finalized and any disclosure of the Railtran's and the transit authorities' position concerning this matter would impair their negotiating position with owners of property under consideration for the site." We have considered the exception you claimed and have examined the documents contained in Exhibits C and D. We conclude that these documents may be excepted from required public disclosure under section 3(a)(5) of the Open Records Act.

Next, you claim that some of the requested information is excepted by sections 3(a)(1) and 3(a)(7) as information deemed confidential by the attorney-client privilege. Section 3(a)(7) excepts

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure. (Footnote omitted.)

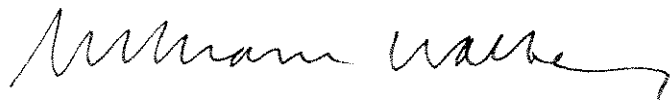
Open Records Decision No. 574 (1990) held that the protection of section 3(a)(7) was limited to information that revealed client confidences to any attorney or that revealed the attorney's legal advice. However, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *See* Open Records Decision Nos. 556 (1990); 462 (1987). Much of the information contained in the letters and communications for which you claim exception under sections 3(a)(1) and 3(a)(7) includes legal opinion and advice. We have marked this information, and it may be withheld from disclosure. The remainder of the information, however, is factual in nature and must be disclosed.

Finally, you claim that some of the requested information is excepted from required public disclosure by section 3(a)(11) which excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." Section 3(a)(11) excepts memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policy-making or deliberative process. Open Records Decision No. 462. However, facts and written observations of fact which are severable from material excepted under section 3(a)(11) are not within that exception. Open Records Decision No. 582 (1990). Having reviewed the documents submitted to us, we conclude that the correspondence titled "UMTA Comments on the Draft Environmental Assessment of RAILTRAN" consists almost exclusively of advice, opinion, or recommendation. Whatever factual information is contained in this report is inextricably intertwined with information excepted under section 3(a)(11) and may not be practicably disclosed. Accordingly, the report may be withheld in its entirety under section 3(a)(11). Other information excepted under section 3(a)(11) which is severable from information of a factual nature has been marked for your convenience and may be withheld from required public disclosure.

Section 3(a)(4) protects "information which, if released would give advantage to competitors or bidders." None of the information which we have found not to be protected by other exceptions falls within the section 3(a)(4) exception.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-502.

Yours very truly,



William Walker
Assistant Attorney General
Opinion Committee

WW/GK/lcd

Ref.: ID#s 13274, 13266

cc: Chris Kelly
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